IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1256

NETTIE MAE PEAK, et al.,
Petitioners,

v.

ALABAMA DEPARTMENT OF INDUSTRIAL RELATIONS and
FAIRVIEW NURSING HOME,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals of Alabama

GEORGE C. LONGSHORE
COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
Attorney for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Cases Cited

Miscellaneous Cited

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. .....

NETTIE MAE PEAK, et al.,
Petitioners,

v.

ALABAMA DEPARTMENT OF INDUSTRIAL RELATIONS and FAIRVIEW NURSING HOME,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals of Alabama

JURISDICTIONAL GROUNDS

The Court has jurisdiction under the provisions of 28 U.S.C.A. §1257(3) to review by writ of certiorari where the validity of a State statute is questioned as being repugnant to the laws or Constitution of the United States and where a right is claimed under the Constitution or laws of the United States:

The judgment sought to be reviewed is the decision of the Alabama Court of Civil Appeals dated June 23, 1976. Upon petition for writ of certiorari the Alabama Supreme Court

initially concluded there was a probability of merit and granted a writ to the Court of Civil Appeals. Thereafter, on December 10, 1976, the writ was "quashed as improvidently granted."

OPINIONS BELOW

The opinion of the Alabama Court of Civil Appeals is reported at — Ala.App. — (1976). The decision is reproduced as Appendix A and attached hereto. The decision of the Supreme Court of Alabama quashing the writ of certiorari is unreported and is attached hereto as Appendix B.

QUESTIONS PRESENTED FOR REVIEW

The issue is whether a state can withhold the payment of unemployment compensation on account of a "labor dispute" to employees who, after their unlawful discharge in violation of the National Labor Relations Act, engage in picketing to protest their termination?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 26 § 206 Code of Ala. 1940 (Recomp. 1958) provides in pertinent part that:

> "An individual shall be deemed totally unemployed in any week during which he performs no services and with respect to which no wages are payable to him, and shall be deemed partially unemployed in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount."

Title 26 § 214A provides as follows:

> "Disqualification for benefits. An individual shall be disqualified for total or partial unemployment:

> a. For any week in which his total or partial unemployment is directly due to a labor dispute still in active progress in the establishment in which he is or was last employed; for the purposes of this section only, the term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. This definition shall not relate to a dispute between an individual worker and his employer."

Article VI of the Constitution of the United States provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

Section 1 of the Fourteenth Amendment provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The employees of Fairview Nursing Home in Birmingham, Alabama, began a campaign to organize a union in late 1971 and early 1972.[1]

The owner and the administrator of the nursing home reacted by attempting to frighten the employees by threats of discharge. When these tactics failed several union activists were fired. The employees protested by collectively reporting to work an hour late on March 11, 1972.

Management responded by firing almost all of the employees. The discharged employees filed complaints with the National Labor Relations Board and also filed for unemployment benefits (see Appendix G), stating that their unemployment came, not as a result of a labor dispute, but as a result of their unlawful discharge. Although the employees met the definition of unemployment (performed NO services and with respect to which NO wages were paid) the state administrative agency disqualified the employees on account of a "labor dispute."

The General Counsel of the National Labor Relations Board (hereinafter the "NLRB" or the "Board") issued a complaint against Fairview alleging that the discharges violated Section 8(a)(1) and (3) of the National Labor Relations Act. 29 U.S. C.A. § 158 *et seq.*[2]

---

[1] These events are chronicled in detail in the Administrative Law Judge's decision found at 202 N.L.R.B. No. 49 (1973) attached hereto as Appendix C.

[2] Section 8(a)(1) and (3) reads:

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

The Administrative Law Judge of the National Labor Relations Board sustained the complaint and ordered the employer to reinstate the discharged employees. 202 N.L.R.B. No. 49 (1973). The Court of Appeals for the Fifth Circuit enforced the Order (486 F.2d 1400) and the Supreme Court of the United States denied certiorari. —U.S.—, 95 S.Ct. 46 (1975).

Meanwhile the decision of the Unemployment Compensation Board of Appeals adverse to the employees was affirmed by the Circuit Court without opinion. (R. 29). On appeal the Alabama Court of Civil Appeals held that the employees were properly disqualified although the Court acknowledged that they had been terminated in "violation of federal laws." The Alabama Supreme Court initially granted a petition for writ of certiorari to the Court of Civil Appeals but quashed the writ on December 10, 1976.

The federal questions raised herein were presented to the state court at each stage of the proceedings. The federal issues were presented to the Court of Civil Appeals (Appendix D) and the Supreme Court in the petition for writ of certiorari . (Appendix E)

REASONS FOR GRANTING THE WRIT

I. The State May Not Deny Unemployment Compensation on Account of a Labor Dispute to an Employee Discharged in Violation of the National Labor Relations Act.

In *Nash v. Florida Industrial Commission*, 389 U.S. 235, 88 S.Ct. 362 (1967), the Supreme Court considered the validity of a ruling by the Florida Industrial Commission that the claimant was disqualified from receiving unemployment compensation on account of having filed an NLRB complaint alleging that her discharge was on account of her union activity. The state agency denied her claim and relied on a law (strikingly similar to § 214 (A) of the Alabama Law) which provided that:

> "An individual shall be disqualified for (unemployment) benefits * * * (4) For any week with respect to which the commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed * * *." p. 365

This Court reversed the state agency:

> "Florida has applied its Unemployment Compensation Law so that an employee who believes he has been wrongly discharged has two choices: (1) he may keep quiet and receive unemployment compensation until he finds a new job or (2) he may file an unfair labor practice charge, thus under Florida procedure surrendering his right to unemployment compensation, and risk financial ruin if the litigation is protracted."
>
> * * *
>
> "Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan."

The case turned on the Court's interpretation of the Supremacy Clause. The alternative Fourteenth Amendment argument was not reached.

Petitioners submit that the case at bar is controlled by *Nash*. Had the Fairview employees walked away from the controversy and not picketed or filed charges to secure their reinstatement they doubtless would have qualified for benefits. Nash holds that unemployment benefits may not be denied by reason of having filed NLRB charges. Petitioners would argue that to the same extent unemployment benefits may not be denied by reason of picketing to protest the termination.

The Alabama Unemployment Compensation Act clearly requires that the unemployment be "directly due" to a labor dispute.[3] These ladies were unemployed directly due, not to a labor dispute, but to an unlawful discharge. The immediate cause of the unemployment was an unlawful termination. Since the Alabama law draws distinctions between voluntary and involuntary unemployment an employee discharged in violation of federal rights is unquestionably involuntarily unemployed and is entitled to receive benefits for which the employee after all has contributed.

Alabama has chosen in its Unemployment Compensation Act to provide compensation only to those unemployed through no fault of their own.[4] The purpose of the Act is to provide protection "against the vicissitudes of enforced unemployment" and "against the evil day of involuntary illness" *D.I.R. v. Drummond*,

---

[3] "For any week in which his total or partial unemployment is *directly due* to a labor dispute still in active progress in the establishment in which he is or was last employed;"

[4] In *D.I.R. v. Stone*, 36 Ala. App. 16, 53 So.2d 859 the claimants returned from vacation to find the working conditions in the mine so drastically changed that "the work could not be performed under the demanding conditions . . ." Although the unemployment was unquestionably over conditions of employment the Court awarded compensation on the theory that there was "no integrity of dealings." In *Johns v. T. R. Miller Mill Co.*, 75 So.2d 675 the Supreme Court of

1 So.2d 395, cert. den. 1 So.2d 402. We do not challenge and indeed we support the classification which denies compensation to those whose unemployment is the result of their own election. But the only election these Petitioners made was to join a union, not a strike.

Contrary to the Alabama Court's opinion we do not seek an inquiry into the "merits of the dispute." We do seek an inquiry into the legality of the events which caused the unemployment. The refusal of the Alabama Courts to inquire into the legality of the dispute does not insure its neutrality, but to the contrary insures that the State will make common cause with the employer who uses illegal tactics in opposing unions. If Alabama has adopted, as claimed by Judge Holmes, a policy of allowing compensation for "justifiable unemployment" then the state may not remain consistent with the Constitution of the United States and deny benefits to employees illegally discharged.

In denying compensation to strikers the State is not penalizing the exercise of a constitutional right. It is merely applying a uniform rule to all who voluntarily absent themselves. It is refusing to subsidize voluntary absence. In disqualifying these petitioners Alabama is not applying its uniform policy against subsidizing voluntary absence. Rather it is deviating from its policy in order to single out and penalize those who engage in a statutorily protected act.

The state may no more penalize the right to engage in concerted activity than it may penalize the exercise of religious beliefs by the device of withholding unemployment compensation from those whose religion forbids Sunday work. In *Sherbert v. Varner*, 374 U.S. 398, 83 S.Ct. 1790 (1963) the state argued

---

Alabama found that a labor dispute does disqualify since it is only a "temporary suspension due to a strike." But the Court intimated that a complete severance of employer-employee relations "would not necessarily serve to disqualify". Ibid. at 680. Again in *Usher v. D.I.R.*, 261 Ala. 509, 75 So.2d 165, claimants who belonged to another union and who did not vote to strike were granted benefits when the UMW walked out and the owners closed the mine.

that to allow benefits to those whose conscience forbide work on Sunday would violate the desired position of neutrality in religious matters. The Supreme Court disagreed. It was the granting of benefits that assured South Carolina's neutrality:

> "Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."

The contention that the Petitioners will be paid twice has surfaced from time to time. Footnote 4 in *Nash* effectively points out that the states are free to recoup payments. On the other hand, it is also correct that the N.L.R.B. has the authority in effectuating the purposes of the Act to refuse to deduct unemployment compensation payments from back pay. As was said in *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 71 S.Ct. 337:

> "To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received."

COOPER, MITCH & CRAWFORD

By: GEORGE C. LONGSHORE
409 North 21st Street
Birmingham Alabama 35203

Certificate of Service

I certify that a true and correct copy of the above and foregoing Petition has been served upon S. Patrick Robinson, 4917 North Bay Drive, Panama City, Florida 32401, and upon the General Counsel, State Department of Industrial Relations, Montgomery, Alabama, by U.S. Mail, postage prepaid, this the 17th day of February, 1977.

.....

George C. Longshore

APPENDIX

APPENDIX A

The State of Alabama—Judicial Department

The Court of Civil Appeals

October Term, 1975-76

Civ. 767

Nettie Mae Peak; Mattie Bee Hill; Nannie Mae Collins; Mary Kate Lanier; Malissa Norris; Hattie Z Kennedy; Helen E. Peeler; Clara M. Barnett; Louvenia Kenerley; Dovie A. Lee; Dorothy A. Hicks; Effie A. Henderson; Addie Lee Ward; and Mable M. Black

v.

State Department of Industrial Relations

Appeal from Jefferson Circuit Court

Holmes, Judge

This is an unemployment compensation case. The State Department of Industrial Relations in appropriate proceeding found that appellant-employees were disqualified for unemployment compensation pursuant to § 214A of Tit. 26, Code of Alabama. 1940. The employees were specifically found to be disqualified because their unemployment was due to a "labor dispute." The Circuit Court of Jefferson County affirmed the determination of the Department, and appellant-employees prosecute this appeal.

The issues before us are whether the doctrines of federal preemption and *res judicata* prohibited the Department from acting as it did in this matter, and whether appellants' unemployment was in fact due to a labor dispute as contemplated by Tit. 26,

§ 214A, Code of Alabama 1940. We decide these issues adversely to appellants, and affirm.

The somewhat involved history of this case, as revealed by the record, is as follows:

The employer in this case is Fairview Nursing Home, a sole proprietorship owned by Mrs. Esther Johnston. In early 1972, many employees of the nursing home, including appellants herein, began to consider organizing as a union. Mrs. Johnston was opposed to this course of action.

Following Mrs. Johnson's continued opposition to the union, and the discharge of several employees allegedly for union activity, it was determined that those employees assigned to the morning shift would report to work one hour late on March 11. The purpose of this protest was apparently to induce Mrs. Johnston to recognize the union.

The action decided upon was taken as planned. When the employees reported to work one hour late on March 11, they were immediately discharged by Mrs. Johnston. While it would serve no useful purpose to set out the pertinent evidence in detail, that evidence definitely establishes that the employees were discharged due to their having signed union cards and having attempted to form a union.

The discharged employees subsequently filed unfair labor practice charges against the employer with the National Labor Relations Board (hereinafter, NLRB). The NLRB found that the employer had committed various labor practices proscribed by the National Labor Relations Act, among which was the discharge of the employees on account of union activity. See § 8(a)(3) of the Act, 29 U.S.C.A. § 158(a)(3). The employer was ordered by the NLRB to offer to restore the discharged employees to their former positions, with back pay, and was further ordered to cease commission of the unfair labor practices

which the NLRB found to have occurred. The opinion and decision of the NLRB, which was introduced into evidence, may be found at 202 N.L.R.B. No. 49.

The United States Fifth Circuit Court of Appeals affirmed the NLRB's action without opinion at 486 F. 2d 1400, and the United States Supreme Court denied certiorari. . . . U. S. . . . , 95 S. Ct. 46.

Following their dismissal, the appellants herein applied to the Department of Industrial Relations for unemployment compensation. Benefits were denied, as noted earlier, on the ground that appellants' unemployment was directly due to a "labor dispute." The controlling statutory provision in this regard is Tit. 26, § 214A, Code of Alabama 1940, which provides as follows:

> "§ 214. Disqualification for benefits.—An individual shall be disqualified for total or partial unemployment.
>
> "A. For any week in which his total or partial unemployment is directly due to a labor dispute still in active progress in the establishment in which he is or was last employed; for the purposes of this section only, the term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. This definition shall not relate to a dispute between an individual worker and his employer."

The Circuit Court of Jefferson County affirmed the Department's finding, and appeal was perfected to this court.

I

Able counsel for appellants initially argues that the federal jurisdiction of the NLRB is preemptive in the labor relations

field, so that the Department was precluded from denying benefits to appellants on the labor dispute ground. We find no merit in this contention.

The preemptive jurisdiction of the NLRB does not extend to activity which is a merely peripheral concern of the federal labor relations acts. *San Diego Building Trades Council, etc. v. Garmon*, 359 U. S. 236, 79 S. Ct. 773. Pertinent here are the employees' rights to self-organization and to protection from certain unfair labor practices. 29 U.S.C.A. §§ 157, 158. The action of the Department as presented by this case is completely collateral to the exercise of these employee rights. Disqualification from unemployment compensation on the ground of a labor dispute does not interfere in any manner with these protected rights so as to confer preemptive NLRB jurisdiction.

II

It is also contended that the decision of the NLRB referred to above is *res judicata* as to the Department, so that the Department was barred from finding as it did. We do not agree.

In order for the *res judicata* doctrine to apply, the parties and subject matter must be the same, the point must be directly in question, and the judgment must be rendered on that point. *Bryan v. W. T. Smith Lumber Co.*, 278 Ala. 538, 179 So. 2d 287.

To this court, in this instance, the parties and the point at issue differ in the two lawsuits. One situation involves the NLRB v. Fairview Nursing Home, while the other is a proceeding between the discharged employees and the Department. In the litigation before the NLRB, the determinative question was whether unfair labor practices had occurred, while the instant proceeding was concerned with whether the employees were disqualified for unemployment compensation due to a

labor dispute. Under these circumstances, we find the doctrine *res judicata* does not apply.

Furthermore, the NLRB's finding that unfair labor practices occurred has no bearing on the question of whether appellants' unemployment resulted from a labor dispute, as will be discussed *infra*.

III

We are now brought to consideration of the most difficult issue raised by this appeal: whether employees who are discharged due to their attempted formation of a union are unemployed due to a "labor dispute" within the meaning of Tit. 26, § 214A, Code of Alabama 1940. We conclude that such a state of affairs is a labor dispute within the meaning of the statute.

We initially note that all the states have laws which in various forms prohibit payment of unemployment benefits to individuals who are unemployed due to labor disputes. 63 ALR 3d 88, at 94. However, Alabama is one of the few states which undertakes to statutorily define the term "labor dispute." *Id.* at 107.

The statutory definition, set out earlier, is identical to the definition of the term found in the National Labor Relations Act, 29 U.S.C.A. § 152(9). *Dept. of Industrial Relations v. Stone*, 36 Ala. App. 16, 53 So. 2d 859.

Several theories have been advanced as to the purpose of the labor dispute disqualification. See Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. of Chicago L. Rev. 294, 296-300. Professor Shadur states that the most widely accepted of these theories are as follows: (1) the unemployment compensation laws are intended to only protect against involuntary unemployment; (2) the disqualification insures governmental neutrality in labor disputes; (3) the disqualification represents a conclusion that an employer should not be required to finance strikes by his employees.

The first of these arguments has been heavily criticized with some justification; a brief perusal of the Alabama unemployment compensation law and the relevant cases will suffice to show that much involuntary unemployment is not compensable, while the opposite is true of some voluntary unemployment. Section 214 of Tit. 26, Code of Alabama 1940, provides, *inter alia*, that one who voluntarily leaves his job with good cause is eligible for benefits, which is not the case with the individual who is dis-discharged by his employer with cause.

It is apparent that a much more accurate characterization of the pervasive scheme behind unemployment compensation law is that the law is intended to protect against justifiable unemployment, which may be voluntary or involuntary. Unemployment due to participation in a labor dispute is thus not justifiable within the contemplation of the statute. This is so due to the remaining two theories set out above.

It is the state's interest in neutrality which is responsible for the seemingly unanimous position among the various jurisdictions that the merits of a labor dispute are not considered in the determination of whether or not a labor dispute exists. 63 ALR 3d at 145. In our research, the only contrary expression which we have discovered lies in the Alabama case of *Department of Industrial Relations v. Stone, supra*. There the Court of Appeals recognized the general rule, but qualified it where a *mala fide* difference of opinion existed between the disputants.

The *Stone* case, *supra*, was strongly criticized by the Supreme Court of Alabama speaking through Justice Simpson in *T. R. Miller Mill Co. v. Johns*, 261 Ala. 615, 75 So. 2d 675. In an extensive discussion citing various authorities, Mr. Justice Simpson held that the merits of a labor dispute are not to be considered in determining whether such a dispute in fact exists, and that the language used in that regard by the *Stone* court was inapposite to its conclusion.

Thus, the general rule as to the merits of a labor dispute prevails in Alabama, and is applicable to the case before us. To hold that no labor dispute existed due to the employer's failure to recognize the appellants' union in violation of federal labor law, would be an impermissible foray into the merits of the controversy.

In this regard, it is germane to note that the Pennsylvania courts were faced with a similar situation in *Burleson v. Unemployment Compensation Board of Review*, 173 Pa. Super. 527, 98 A. 2d 762. In that case, the employer refused to bargain with its employees' union, in violation of federal law, when a previous contract between employer and union expired. In affirming a denial of benefits to workers unemployed due to the resulting work stoppage, the court by way of recognizing the general rule stated that, "Proof of a violation of the Act will not support an award."

As stated earlier, it is the governmental desire to maintain a position of neutrality as regards labor disputes in the unemployment compensation area which lies behind the doctrine of non-inquiry into the merits. A separate forum exists for the resolution of labor controversies; that is, the NLRB. Matters pertaining to the merits of labor disputes are committed solely to that forum; the State Department of Industrial Relations is concerned only with whether a labor dispute exists.

The definition of the term "labor dispute" used in the statute further illustrates the state's desire to remain neutral insofar as possible. As noted earlier, this definition is exactly the same as that found in the National Labor Relations Act.

As used in the Act, this broad definition was intended to provide an expansive scope to liberal and remedial legislation. It is thus somewhat anomalous, as noted in *Badgett v. Dept. of Industrial Relations* (Simpson, J., concurring in the result),

30 Ala. App. 457, 10 So. 2d 872, for this definition to be employed as an exception in the unemployment compensation law for the purpose of restricting rights afforded under that law. However, ". . . it may properly be stressed that the use of the term 'labor dispute' by a legislature when legislative definitions of the very same term were already in effect, would indicate that the legislature intended that the term be interpreted in the same way." Williams, *The Labor Dispute Disqualification—A Primer and Some Problems,* 8 Vanderbilt L. Rev. 338, 342. As such, the evident legislative intent was to remove from the coverage of the unemployment compensation law those persons who are unemployed due to active participation in a labor dispute as that term is used in the National Labor Relations Act.

So viewed, the situation before us is within the ambit of the definition. Its plain meaning would include the present dispute as a ". . . controversy . . . concerning the association or representation of persons in negotiating . . . terms or conditions of employment . . ." Furthermore, the definition in the National Labor Relations Act includes controversies where employees are discharged for having attempted to unionize, as the term "labor dispute" as used in the Act is jurisdictional with regard to the NLRB. 29 U.S.C.A. § 152(9); *NLRB v. International Longshoremen's Association,* 332 F. 2d 992, 56 LRRM 2244. The NLRB could not have entertained the present controversy, as it did, unless that controversy were in fact a "labor dispute" within the meaning of the Act.

The commentators have additionally pointed out that various practical problems would arise if the existence *vel non* of a labor dispute for unemployment compensation purposes were dependent upon the merits of the controversy. Inconsistent and anomalous decisions would be rendered by the different decision-making bodies involved. Williams, *Id.,* at 373. Additionally, there would be administrative difficulties, such as the fact that an employee could receive both back pay under an NLRB order

and unemployment compensation for the same time period. Shadur, *Id.,* at 307. Administrative machinery vastly more complex than that presently existing would be required for the system to function effectively.

We would finally note once more that another basis for the disqualification is that an employer should not be forced to contribute support to those who are unemployed due to labor disagreements which they have with him. The legislature made no exception for the contingency that the employer might be clearly wrong on the merits of the controversy, and we cannot by judicial fiat create one. This is not unreasonable in view of the fact that the employee has a remedy with the NLRB, to which body the resolution of labor disputes has been committed.

While we are sympathetic to those employees who lose their jobs through violation of federal laws by their employers, we feel that there are compelling reasons why they should not receive unemployment compensation if their discharge was due to a labor dispute within the meaning of Tit. 26, § 214A, Code of Alabama 1940. In the instant situation, such a labor dispute existed. As such, and for the foregoing reasons, the case is therefore due to be affirmed.

AFFIRMED.

Wright, P. J., and Bradley, J., concur.

I, John H. Wilkerson, Jr., Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith put out as same appears of record in said court.

Witness my hand this 23rd day of June, 1976.

JOHN H. WILKERSON, JR.
Clerk, Court of Civil Appeals of Alabama

APPENDIX B

The State of Alabama—Judicial Department

The Supreme Court of Alabama

October Term, 1976-77

Ex parte: Nettie Mae Peak, et al.

S. C. 1972

Petition for Writ of Certiorari to the
Court of Civil Appeals

(In re: Nettie Mae Peak et al.
v.
State Department of Industrial Relations and
Fairview Nursing Home, Intervenor)

Jones, Justice.

Writ quashed as improvidently granted. Quashing of the writ in this cause is not to be construed as agreeing with that portion of the opinion of the Court of Civil Appeals that the facts as found by that Court constitutes a "labor dispute" as that term is used in Title 26, § 214A. Code. See *Nash v. Florida Industrial Commission*, 389 U. S. 235 (1967).

WRIT QUASHED.

All the Justices concur. except Beatty, J., not sitting.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 10 day of Dec. 1976.

s/ J. O. Sentell
Clerk, Supreme Court of Alabama

APPENDIX C

Fairview Nursing Home *and* Public Employees Organizing Committee *and* Quenten Oliver Varner.
Cases 10-CA-9482 and 10-CA-9663

March 9, 1973

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On December 7, 1972, Administrative Law Judge Lowell Goerlich issued the attached Decision in this consolidated proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to

---

[1] Respondent also has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

Respondent also contends that the Administrative Law Judge prejudiced its case by failing to find that the alleged discriminatees were told by Respondent's counsel, Robinson who was also Respondent's administrator, to go to work after they were fired. Contrary to Respondent, the Administrative Law Judge did find that the em-

affirm the rulings,[1] findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Fairview Nursing Home, Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Administrative Law Judge's recommended Order.

DECISION

Statement of the Case

Lowell Goerlich, Administrative Law Judge: The charge in Case 10-CA-9482, filed by Public Employees Organizing

---

ployees were initially told by Robinson to go to work but found that when they told him they were fired by Mrs. Johnston, Respondent's owner, for signing union cards, Robinson then told them "[W]ait for your second check. I'll make out your other checks," and never informed the employees that they were not discharged for signing union cards. We agree with the Administrative Law Judge that the aforesaid conduct did not constitute a valid offer of reinstatement.

We have reviewed the Administrative Law Judge's rulings made at the hearing and find that they are free from prejudicial error.

[2] The Administrative Law Judge inadverently found that the discharges of Supervisors Effie Henderson and Vicki Grammer were violative of Sec. 8(a)(3) and (1) of the Act when it is clear that these discharges are only violative of Sec. 8(a)(1). Member Penello concurs in these findings as he is of the view that these discharges, which were made in the context of pervasive unfair labor practices, were part and parcel of these other violations, and were not motivated by the prounion activity of the *supervisors* as at the time Respondent fired all union card signers it was not aware that they had signed cards, but rather were part of a *pattern* of conduct aimed at penalizing *employees* for their union activities.

Committee, on March 13, 1972,[1] was served on the Respondent, Fairview Nursing Home, by registered mail on March 15. A complaint and notice of hearing was issued May 18, 1972. The complaint charged that on February 27 the Respondent discharged its employee, Ola Veneziano, and on March 11 discharged its employees, Edna Avery, Clara Barnett, Margaret Edna Barnett, Maxine Bell, Mabel Black, Bernice Bowden, Emma Bryant, Willen Dean Cary, Zollie Culverson, Ruby Carpenter, Nannie Mae Collins, Lucile Cummins, Kathleen Gillian, Willie B. Hall, Dorothy Hartefield, Mamie L. Henderson, Dorothy Hicks, Mattie Hill, Winifred Hudson, Richard Jones, Odesa Carlton, Luvenia Kenerly, Mattie Kennedy, Mary Kate Lanier, Dovie Lee, Imogene Maharrey, Etha L. Martin, Elvira Mason, Dorothy McDaniel, Magnolia Mitchell, Missa Norris, Nettie Peak, Helen Peeler, Willie Posey, Eleanor Reese,[2] Mary Elizabeth Richey, Lutitia Swanson, Andrew Tabb, Addie L. Ward, and Etta Lee Wright, in violation of Section 8(a)(3) of the National Labor Relations Act, Series 8, as amended, herein referred to as the Act. It was further charged in the complaint that the Respondent engaged in surveillance of a union meeting of its employees. On August 4, an amendment to the complaint was filed in which the names of Effie Henderson and Vicki Grammer were added to the complaint.

The charge in Case 10-CA-9663 filed by Quenten Oliver Varner, an individual, on June 30, was served on the Respondent by registered mail on July 3. The complaint and notice of hearing was issued on August 4. The complaint charged that the Respondent had discharged its employee, Quenten Oliver Var-

---

For the reasons set forth in his dissenting opinion in *Krebs and King Toyota, Inc.*, 197 NLRB No. 74, Member Kennedy would not find these discharges to be violative of the Act and would accordingly dismiss these allegations in their entirety.

[1] All dates herein refer to 1972 unless otherwise noted.

[2] Eleanor Reese testified as Eleanor Reese Mills.

ner, on March 11, in violation of Section 8(a)(3) of the Act. In addition, it was charged that the Respondent informed its employees that it would be futile to select the Union as their bargaining representative because the Respondent would not have a union to represent its employees; that it had coercively interrogated employees about their union membership, activities, and desires; that it had created an impression of surveillance of its employees' union activities; and that it had promulgated, maintained, and enforced a rule prohibiting its employees from engaging in any activities on behalf of a union at any time in the nursing home.

On August 4, an order was entered consolidating Cases 10-CA-9482 and 10-CA-9663.[3]

The Respondent filed timely answers denying that it had engaged in any of the unfair labor practices alleged. *Inter alia*, in its answer in Case 10-CA-9482, Respondent admitted that Ola Veneziano was discharged, but alleged that the discharge was "for cause in that said former employee created a disturbance on the job, and used disrespectful language and profanity to a supervisor, constituting insubordination and misconduct, and therefore was not eligible for reinstatement." The Respondent further denied that it had discharged the other employees listed in the complaint and answered that "said former employees quit without notice and thereby abandoned all lawful interest in said employment."

The consolidated cases came on for trial on September 26, 27, 28, and 29, 1972, at Birmingham, Alabama. Each party was afforded a full opportunity to be heard, to call, examine, and

[3] Hospital Employees Local 1318, Laborer's International Union of North America, AFL-CIO, the Petitioner in Case 10-RC-9112, was allowed to intervene in this proceeding in that a finding in the instant case as to whether or not the Respondent wrongly discharged certain employees would affect the eligibility of those employees whose ballots were challenged in the representation election.

cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

Findings of Fact[4]

I. THE BUSINESS OF THE RESPONDENT

The Respondent is, and has been at all times material herein, a sole proprietorship with its principal office and place of business located at Birmingham, Alabama, where it is engaged in the operation of a nursing home.

The Respondent during the past calendar year, which period is representative of all times material herein, received gross revenues in excess of $400,000, $86,000 of which were derived from Medicaid payments by the Federal Government. During the first 3 months of 1972, a representative period, the Respondent purchased goods valued at $360 from a supplier within the State of Alabama, who received such goods directly from outside the State of Alabama. Projected to a yearly expenditure, such purchases would total $1,440. Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[5] (See Decision and Direction of Election in Case 10-RC-9112.)

On the first day of August 1972, the Respondent entered into a lease and option agreement with Vari-Care, Inc., a Delaware corporation. The lease and option agreement provided for a term of 5 years, commencing on the first day of September 1972

[4] The facts found herein are based on the record as a whole and the observations of the witnesses.

[5] The Respondent admitted the facts above-stated, however, denied that it was engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

and ending on the last day of August 1977, with a monthly rental of $65 "for each bed which tenant is permitted to use by virtue of its license to operate the facility under the laws of the State of Alabama as of the commencement of each monthly period, for which the rent is charged, which in no event shall be less than a 165 beds." The lease was subject to an option to purchase the premises at any time during the term of the lease or at any renewal thereof at a price of "$10,000 for each bed which the tenant is permitted to use by virtue of its license to operate the facility by the State of Alabama at the time of the exercise of the option, which in no event shall be less than one hundred and sixty-five (165) beds," a total consideration of $1,650,000. A license effective September 20, 1972, was issued by the Alabama State Board of Health to Vari-Care, Inc., to operate Fairview Nursing and Convalescent Home, "under their operational ownership." On September 22, the Respondent terminated all of its employees and turned the keys and the operation of its nursing home business over to Vari-Care, Inc. Vari-Care, Inc., hired new employees and some of those who had been employed by the Respondent.

II. THE LABOR ORGANIZATION INVOLVED

Public Employees Organizing Committee, herein referred to as the Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.[6]

[6] In Case 10-RC-9112, the Regional Director for Region 10 issued a Supplemental Decision and Order Amending Decision and Direction of Election, in which the Regional Director found that, "Laborer's International Union of North America, AFL-CIO, Hospital Employees Local 1318 has replaced PEOC [Public Employees Organizing Committee] as Petitioner herein." The Regional Director further found that Local 1318 was an organization in which employees participated and which existed for the purpose of representing employees with regard to working conditions, ... and employee grievances and was a labor organization seeking to represent certain of the employer's employees. The Regional Director ordered an election with Local 1318 on the ballot. A request for review of the Regional Director's decision was denied by the Board. In the earlier Decision and Direction of Election, dated May 3, 1972, the Acting Regional Director for Region 10 had found that Public Employees Organizing Committee was an organization in which employees participated and that it existed for the purpose of dealing with employers cencerning wages, hours of employment, and conditions of work and that it was a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES[7]

A. *Pertinent Facts*

At all times material herein Esther J. Johnston, sometimes referred to herein as Mrs. Johnston, was the owner of the Respondent, S. Patrick Robinson was the administrator (Robinson also appeared as attorney for the Respondent in this proceeding), and Ronnie Johnston was the assistant administrator.

Alex J. Hurder was the chairman of the Public Employees Organizing Committee and is presently the president of Local 1318 of the Laborer's International Union, which position he assumed in the first week of May 1972. Public Employees Organizing Committee was formed in November 1971 for the purpose of representing employees of the University of Alabama in matters concerning wages, hours, and working conditions. Thereafter, its objectives were broadened to include the representation of employees of nursing homes in the Birmingham area.

[7] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard for the natural logic of probability, the demeanor of the witnesses, and the teaching of *N.L.R.B. v. Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408. As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it is in and of itself incredulous and unworthy of belief. In addition, consideration has been given to the fact that many of the General Counsel's witnesses were cross-examined as to incidents in which the Respondent's cross-examiner was personally involved and did, notwithstanding, testify adversely to the Respondent.

On January 20, 1972, a rally was held by the Public Employees Organizing Committee at which Ralph Abernathy, president of the Southern Christian Leadership Conference, was the principal speaker. Pamphlets were distributed announcing the rally. Four or five employees of the Respondent attended. Several of these employees signed authorization cards for the Union. On January 27, an organizational meeting was held for those who had signed cards. Some of the employees of Respondent attended this meeting. During the first week in February, at a meeting of the Respondent's employees, employees Ola Veneziano and Mattie Kennedy were elected cochairwomen.

About the middle of February some of the Respondent's employees met at the Steelworkers hall in Fairfield. On that occasion, employee Luvenia Kenerly arrived early and waited in front of the Steelworkers hall. With her were employees Dorothy Hicks, Lucile Cummins, Ola Veneziano, and others. Ronnie Johnston, in an automobile parked directly across the street, was observing the employees. About 2 weeks later, Ronnie Johnson again observed the employees while in a parked car across the street from the Center Street Baptist Church where the Respondent's employees were holding a union meeting.

Another union meeting was held on February 26 at Lucile Cummins' home. About 10 or 12 of the Respondent's employees were present. In that several employees of the Respondent had been recently discharged the possibility of a strike was discussed. It was decided, however, to encourage the employees to find some other means of protesting. A P.E.O.C. newsletter was distributed. On February 27, employee Kenerly placed a copy of the newsletter under Mrs. Johnston's door between 6:30 and 7 a.m. Shortly thereafter, Robinson came in, picked up the newsletter, read it, and then left the area. The newsletter contained a letter from a dissatisfied, unidentified "LPN from Fairview." The abbreviation, LPN, indicates a Licensed Practical Nurse.

About 10 minutes after the newsletter had been slipped under Mrs. Johnston's door Ola Veneziano was discharged. About a week later, employee Kenerly heard Robinson say to the head housekeeper, Lena Nichols, that "[H]e didn't think that he had anything to worry about. That he thought they got the head of the Union when they fired Ola."

According to a report which Mrs. Johnston[8] claimed she had received from Mr. Robinson, Veneziano had been "fussing" all night with another employee, Beulah Smith. Robinson asked both of the employees what the trouble was. Veneziano, "started talking loud talk to him . . . She asked him to go to hell and he asked her to leave. Check out and leave."[9] Veneziano was discharged, between 6 and 7 o'clock.

On February 27, 1972, Hurder phoned Mrs. Johnston and informed her that he was chairman of the Public Employees Organizing Committee and that he wanted to talk to her about the discharges and the situation at the nursing home. She agreed to meet with him around 3 o'clock at which time he appeared at the nursing home in the company of Virgil Pierson, a representative from the Steelworkers. When they arrived, Mrs. Johnston had left. They waited about 20 minutes, but she did not return.

On March 6, an informational picket line was placed at the foot of the hill on which the nursing home was located. The pickets carried signs explaining that employees had been discharged for organizing. This picket line, which continued

---

[8] Mrs. Johnston's credibility has been given serious consideration. Her resentment and indignation at her employees' signing union cards were apparent in her demeanor as she testified. She gave the strong empression that her account of the March 11 events was not strictly in accord with what actually happened. As to the discharge of Veneziano, the reason given by Mrs. Johnston for her discharge is not accepted as the true reason.

[9] Testimony of Mrs. Johnston.

through March 11, was manned by the six employees who had been fired by the Respondent and other members of the Union from hospitals in Birmingham. None of the employees of the nursing home joined or observed the picket line.

When it became apparent that the Respondent did not intend to recall the employees whom it had fired, there was general sentiment among the employees in favor of striking. Rather than to engage in the strike it was determined that the morning shift should call in late on March 11, and report to work an hour late. This course of action was followed.

Prior to March 11, the Respondent had held several biweekly staff meetings. At one of these meetings, Mrs. Johnston said, "You can't have a union come in here. I'm private owned and no one will come in and tell me how to run my business." Both Mrs. Johnston and Robinson were quoted as saying at a staff meeting that they "weren't going to have no union up there;" that the first one whom they "caught trying to form a union they were automatically fired;" and "if they were thinking that now [they] could resign." Mrs. Johnston was also quoted as saying at staff meetings that "anybody that tries to bring a union to my building I will fire every last one of them," and that "anybody who tried to form a union and signed cards [I will] fire every last one of them."[10]

About 3 weeks before March 11, LPN Bradford upon instruction from Mrs. Johnston called several employees over a loudspeaker to appear at the second floor nurses' station. These employees included employees Lanier, Avery, Lee, Mitchell, and Peeler. Mrs. Johnston indicated that someone had informed her that the employees were trying to start a union. She said, "y'all can't do that because I am self-owned, I'm self-operated and I won't have a union in my place." At this point the tele-

[10] Although Mrs. Johnston testified, the foregoing testimony was not denied.

phone rang and Mrs. Johnston, in answering it, said, "I do need nurse's aides and it won't be long until I'll need a lot more." Mrs. Johnston told the employees to return to work and that she "didn't want to hear anymore of this about a union."

In about the middle of February, Mrs. Johnston phoned employee Helen Elizabeth Peeler to report for work. During the conversation, Mrs. Johnston asked her whether she knew "anything about the union." Peeler lied to her in response. About 3 weeks before March 11, employee Edna Avery called Mrs. Johnston in respect to her schedule. During the conversation, Mrs. Johnston asked employee Avery whether she knew "anything about this union business." She also asked her whether she had attended "any of them ol' meetings." Although Avery had signed a union card, she denied knowledge of the Union and that she had attended one meeting.

About 2 weeks before March 11, Mrs. Johnston asked employee Emma Bryant in the presence of Willie Posey, "Have you been attending any of these meetings?" Bryant answered in the negative. Whereupon Johnston insisted, "You have." Bryant answered, "No, ma'am, I attended a rally." Mrs. Johnston then said that she had heard something about a union and asked Bryant whether she knew anything about it. Bryant answered in the negative. Johnston responded, "If I ever hear talk that you all tried to bring a union in here I'm going to fire every last one of you."[11]

Sometime during the first week of March, Mrs. Johnston phoned Eleanor Reese Mills in order to ascertain when she would

[11] Employee Posey testified credibly that he was asked to join the group by Mrs. Johnston and that she also interrogated him as to whether he knew anything about the "union business." He quoted her, saying, "if they are trying to sneak a union in here, she was not going to have it. Every one would be fired at the time she found out about it." During the period prior to March 11, Posey said that he had several phone conversations with Mrs. Johnston in which the Union was mentioned. During these conversations, Mrs. Johnston asked him whether he had signed a union card and also told him "not to sign one."

be able to return to work. During the conversation, Mrs. Johnston asked Mills whether she had signed a union card.

About 2 weeks before March 11, Head Housekeeper Nichols and employee Mamie Henderson were in the linen room. Nichols said to Henderson, "You was at the meeting last night." Henderson answered in the negative. After repeating herself several times and again receiving negative answers, Nichols said, "Some respectable person saw you there." Henderson again denied the fact. Nichols added, "Mrs. Johnston is going to fire all of them that signed union cards."

On or about the first of March, Nichols escorted employee Clara Barnett to Mrs. Johnston's office, where Mr. Robinson, Mrs. Johnston, and Mrs. Robinson were waiting. Mr. Robinson asked her whether she knew anything about the Union; she answered, "Yes, sir." Whereupon Robinson said, "Didn't you know this nursing home belonged to Mrs. Johnston . . . Didn't Mrs. Johnston sign your checks?" He then asked her whether she had signed a union card. She answered, "Yes, sir," and asked if she was fired. Johnston responded, "No, go on back to work."

On the morning of March 11, LPN's Effie Henderson and Virginia Diliberto reported for work at 7 o'clock.[12] Employees on the first shift did not appear but Henderson received phone messages from some employees such as, "The car broke down. Some of them had to change tires. Some had to catch the bus." Diliberto informed Mrs. Johnston of the situation whereupon Mrs. Johnston came to the nursing home. In the meantime, the employees arrived for work and were instructed by Nichols to proceed to the lobby. Among the first of these employees was Mary Kate Lanier to whom Mrs. Johnston said, "What are you doing coming in this time of morning?" She answered, "We were told to be an hour late." Addressing employee Helen Peeler,

[12] For the purposes of this decision the General Counsel concedes that the LPN's are supervisors within the meaning of the Act.

Mrs. Johnston asked whether she was "with that trash." Peeler answered, "Yes, ma'am, I am." Mrs. Johnston responded, "Well, get down to the foot of the hill with them, you sorry looking thing." To employee Willie Posey, who, according to Mrs. Johnston, depended on her and called her "Mamma Johnston," Mrs. Johnston said, "Willie, you been knowing about this thing all the while and you've been lying to me all the time. As far as I'm concerned with your little black self you can get down the hill with the rest of them." Angrily Mrs. Johnston declared that any employee who "signed a union card was fired." She told the assembled employees, to get down to the foot of the hill with the rest of the "idiots" and off her property. She informed the employees that she had called the police who soon arrived and told the employees it was "best" for them to go to the bottom of the hill. At that time, arrangements were made for the police to escort the employees back to the nursing home to receive their paychecks which were due at 3 o'clock that afternoon. The employees proceeded to the bottom of the hill. Henderson, who was watching from a window, upon seeing the employees leave, "threw the medicine keys down" and addressing Diliberto said "Here, it's yours. I'm gone with them." Employees in this group who were ordered off the premises and discharged were Luvenia Kenerly, Dorothy Hicks, Helen Peeler, Mary Kate Lanier, Quenten Varner, Margaret Barnett, Willie Posey, Zollie Culverson, Etta Wright, Dovie Lee, Mattie Hill, Nannie Mae Collins, Willen Dean Cary, Dorothy McDaniel, Mamie Henderson, Eleanor Reese Mills, and Missa Norris, all of whom had signed union cards. These employees were joined by other employees at the bottom of the hill who learned from them that if they had signed a union card they were discharged. These additional employees were Mattie Kennedy, Magnolia Mitchell, Emma Bryant, Winifred Hudson, Andrew Tabb, Mary Elizabeth Richey, Mabel Black, Clara Barnett, Maxine Bell, Lucile Cummins, Kathleen Gillian, Richard Jones, Odesa Jelks Carlton, Addie Ward, Ruby Carpenter, Nettie Mae Peak, Elvira Mason, and Effie Henderson, all of whom had signed union cards.

On two occasions, between 10:30 and 11 a.m. and approximately at 2:30 p.m., Administrator Robinson appeared at the foot of the hill and offered the employees their paychecks. On each occasion, when the employees refused the checks, Robinson made the statement that the employees might as well take their checks because they were fired anyway. On the latter occasion, employee Emma Bryant remarked to Robinson that "we are fired two times in one day."

At 3 p.m., the employees appeared at the nursing home to receive their checks, as previously appointed. Among these employees were third-shift employees who were dressed for work. Robinson told these employees to go to work. The employees responded that they were fired and that Mrs. Johnston said "it went for everybody who had signed union cards." Robinson then told them, "[W]ait for your second check."[13] "I'll make out your other checks." These employees as well as others were given two checks.[14] When employee Magnolia Mitchell appeared she was given one check. She brought this matter to Robinson's attention and said, "If we are fired for signing cards I want my other four days." Robinson answered, "If you will wait I will make it." Employee Andrew Tabb, a card signer, who was not scheduled to work on March 11, also appeared for his check. He was given two paychecks, "a check that [he] was supposed to pick up and the days [he] had remaining that [he] had worked over because the pay period had closed." Tabb was not scheduled to work until the following Monday.

---

[13] One paycheck covered wages earned during the pay period for which payment was to have been made on Saturday, March 11. The second check referred to wages which had been earned after such pay period ended. Normally, payment for this period would not have occurred until the following Saturday.

[14] Significantly at no time, although the opportunity presented itself, did Robinson inform the employees that they were not discharged for signing union cards or invite any of the card signers to return to work.

Employee Edna Avery, a card signer, last worked on March 10 and was not scheduled to work again until Wednesday, March 15; however, she had made arrangements with Robinson that he would call her on Sunday if her days could be increased from 3 to 5 days a week. When he had not called as of Wednesday, she called Mrs. Johnston. She said to Mrs. Johnston, "[i]f I'm fired would you mail me my check, my last check." Mrs. Johnston answered, "Yes, ma'am, I will." When Avery asked when she would mail it, Mrs. Johnston replied, "When I get good and ready."

Some time in late August, employee Posey called Mrs. Johnston and asked to return to work. She said that she would give him some work at her home, but she wanted to talk to Robinson first. She asked Posey to call back the next day. When Posey called again Mrs. Johnston told him that Robinson "thought that it was best for [Posey] not to return to work because [he] was in this mess, too, and to wait until all of it was over."

The Respondent offered evidence indicating that certain employees ought not to be reinstated because of their misconduct.

Janis Chaffin, a receptionist and secretary, said that on one occasion she answered the phone and a man said, "Tell Mr. Robinson if he wants to keep on living him and his wife will stay at home." The person was not identified. Chaffin also said that she received a telephone call from Elizabeth Richey. Richey said, "They are going to bomb your house tonight." Chaffin also testified that roofing nails on one occasion had been scattered at the bottom of the driveway near the side of the highway.

Employee Addie Cogburn claimed that employee Elizabeth Richey said to her, "If we catch you going in that nursing home again we will kill you."[15] Hilda Lee Cogburn, a sister-in-law

---

[15] Most of the employees who were working on March 11 were new employees.

of Addie Cogburn, said that while she went through the picket line Richey "screamed out if we didn't stop going to the nursing home she would be waiting on us at night and kill us and we wouldn't go back. She called us tramps and said we took their jobs. . . . She called us slums, bastards, and everything else."

Loma Robinson described an incident involving Quenten Varner which took place around the first part of May or the latter part of April at Miller's parking lot. Loma Robinson was sitting in her automobile when her sister approached, indicating that employee Varner was following her. After her sister entered the automobile and as the automobile commenced to move, Varner rammed a shopping cart into the right side of the car. Both ladies, who are in their early 60's, were greatly agitated by the incident and according to Loma Robinson her sister became ill and a short time thereafter was placed in intensive care. Early in June she died. Cause of death was listed as heart failure.[16]

Employee Zollie Culverson went with the employees to the bottom of the hill on March 11. When Robinson offered the checks to the employees at the bottom of the hill on March 11, Culverson took his check which was payment in full for the time he had worked. About a month later, Culverson went back to work for 1 day. Mrs. Johnson had offered him a raise from a $1.68 an hour to $2.25 an hour.

After he had returned to work for the 1 day, Dorothy McDaniel, Emma Bryant, and Magnolia Mitchell, who usually transported him to the picket line, arrived at his home in an automobile. McDaniel was informed that Culverson was going to work. The employees left. Shortly thereafter, the three employees saw Culverson near a ball park and stopped the auto-

[16] Mattie Mae Smiley accused Mattie Hill of a telephone threat. Hill denied the threat. In view of Hill's denial and the vagueness of the identification, a finding that Hill made the telephone threat is not supported and none can be made.

mobile. They asked Culverson where he was going. He replied that he was going to work. They asked him why he was not going to the picket line. A brief discussion followed after which he entered the automobile with the three women. They proceeded to Elanor Reese's house. Kenerly and Hicks also went to Reese's house. The women and Culverson remained there for about a half hour, during which time Culverson asked for and received some whiskey. Among other things Culverson said, "Y'all, I know I did wrong. I shouldn't have gone back up there because Mrs. Johnston has been so dirty to me." McDaniel jocularly said, "Come on, Zollie. We are going to teach you a little lesson." From a "little hedge bush" in Reese's frontyard McDaniel seized a small switch and, while Culverson was laughing, she struck him "one or two licks." All of the employees were laughing.

After the incident, the employees including Culverson went together to the picket line. At the picket line Culverson asked some of the women to wrap his head with white gauze so that he could fool Mrs. Johnston. This was done.[17]

A. *The Alleged Violations of Section 8(a)(1) of the Act*

As noted above, Mrs. Johnston interrogated employees with respect to their union activities. These interrogations occurred within the context of other unfair labor practices. Their purpose was not communicated to the employees nor were any assurances against reprisals given to them.[18] Indeed while interrogating one

[17] In respect to this incident, where Culverson's testimony conflicts with that of Mitchell it is discredited.

[18] The Board has said, "Questioning selected employees about their own sympathies . . . without any assurance against reprisal, by its very nature tends to inhibit employees in the exercise of their right to organize." *Engineered Steel Products, Inc.*, 138 NLRB No. 52.

employee, Mrs. Johnston threatened that if employees tried to bring in a union "every last one" would be fired. Moreover, the Respondent did not prove that such questioning was pursuant to the Employer's legitimate business interests. The effect of the questioning was to inhibit union activity[19] and instill in the minds of employees fear of discrimination on the basis of the information sought.[20] Accordingly, it is found that by the following interrogations the Respondent violated Section 8(a)(1) of the Act:[21]

(a) Mrs. Johnston's interrogation of employee Peeler about the middle of February as to whether she knew "anything about the union."

(b) Mrs. Johnston's interrogations of employee Avery about 3 weeks before March 11 as to whether she knew "anything about this union business" and whether she had attended a union meeting.

(c) Mrs. Johnston's interrogations of employee Bryant in the presence of employee Posey about 2 weeks before March 11 as to whether she had been attending union meetings and whether she knew anything about the Union.

(d) Mrs. Johntson's interrogation of employee Posey about 2 weeks before March 11, as to whether he knew anything about the Union and her interrogations of him as to whether he had signed a union card.

---

[19] "It is well settled that such interrogation violates Section 8(a)(1) when its probable effect is to inhibit union activity." *N.L.R.B. v. Southern Electronics Co.*, 430 F.2d 1391 (C.A. 6).

[20] "Such interrogation as to union sympathy and affiliation has been held to violate the Act because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B. v. West Coast Casket Company, Inc.*, 205 F.2d 902, 904 (C.A. 9).

[21] See *N.L.R.B. v. Super Toys, Inc.*, 458 F.2d 180 (C.A. 9); *Hendel Manufacturing Company, Incorporated*, 197 NLRB No. 179.

(e) Mrs. Johnston's interrogation of employee Eleanor Reese Mills during the first week of March as to whether she had signed a union card.

(f) Administrator Robinson's interrogations of employer Barnett about the first of March as to whether she knew anything about the Union and whether she had signed a union card.[22]

The Respondent also violated Section 8(a)(1) by threats of reprisal uttered at employee staff meetings, to wit: "You can't have a union come in here": the first one "caught trying to form a union" would be "automatically fired";[23] and "anybody who tried to form a union and signed cards the [Mrs. Johnston] would every last one of them." Likewise the Respondent violated Section 8(a)(1) by Mrs. Johnston's threat to employee Bryant about 2 weeks before March 11 when she said, "If I ever hear talk that you all tried to bring a union in here I am going to fire every last one of you." The Respondent further violated Section 8(a)(1) by the head housekeeper's threat to employee Henderson about 2 weeks before March 11, to wit: "Mrs. Johnston is going to fire all of them that sign cards."[24]

When Assistant Administrator Ronnie Johnston observed the employees' meeting places from a car parked across from the Steelworkers hall and later at the Center Street Baptist Church, the Respondent violated Section 8(a)(1) of the Act. When Mrs. Johnston told employees that someone had told her that the employees were trying to start a union and when Head Housekeeper Nichols informed employee Henderson that "some re-

---

[22] Although Mrs. Johnston testified, none of these coercive interrogations was denied.

[23] The Board has said, "We regard a threat of job loss to be a serious deterrent to organizational activity." *Comet Rice Mills Division, Early California Industries, Inc.*, 195 NLRB No. 117.

[24] Although Mrs. Johnston and Mrs. Nichols testified, they did not deny the foregoing threats.

spectable person" had seen her at a union meeting, the Respondent created the impression that its employees' union activities were under surveillance and thereby violated Section 8(a)(1) of the Act.[25]

B. *The Discharge of Ola Veneziano*

Not only does the uncontroverted and credited testimony of employee Kenerly (Kenerly testified that she overheard Administrator Robinson say that "he didn't think that he had anything to worry about. That he thought they got the head of the Union when they fired Ola") support a finding that Veneziano was discharged in violation of Section 8(a)(3) of the Act, but other factors support the same conclusion. Veneziano had been seen by Assistant Administrator Ronnie Johnston at a union meeting place; she was the cochairwoman of the union;[26] she was discharged shortly after a union newsletter had been observed by Administrator Robinson and during the Union's intial organizational attempt;[27] and there is no credible evidence that she had not been a satisfactory employee.[28] Moreover, Veneziano was discharged during a period in which the Employer was exposing its union animus by coercive interrogations and threats of discharge to employees who signed union cards.[29] Additionally, to rebut the General Counsel's *prima facie* case the Respondent produced vague and illusory evidence evidence. The Respondent relied solely upon the hearsay testimony of Mrs. Johnston, who is a discredited witness. The Respondent did not offer the testimony of the employee with whom Veneziano, is alleged to have "fussed" the night of February 26. The record is barren of any explanation for the absence of this witness.[30] Obviously, the Respondent has not met the General Counsel's *prima facie* case. Accordingly, it is clear that the Respondent's defense savors of pretext and that the "real motive"[31] of the Respondent was to discourage membership in a labor organization.[32] By the discharge of Ola Veneziano on February 27, 1972, the Respondent violated Section 8(a)(3) of the Act.

---

[25] "[T]he law reasons that when the employer either enages in surveillance or takes steps leading his employees to think it is going on, they are under threat of economic coercion, retaliation, etc." *Hendrix Manufacturing Company, Inc.*, 321 F.2d 100, 104, fn. 7 (C.A. 5). See also *N.L.R.B. v. Ralph Printing and Lithographing Company*, 371 F.2d 687, 691 (C.A. 8).

[26] "Obviously the discharge of a leading union advocate is a most effective method of undermining a union organizational effort." *N.L.R.B. v. Longhorn Transfer Service*, 346 F.2d 1003, 1006 (C.A. 5).

[27] As stated in *N.L.R.B. v. Jamestown Sterling Corp.*, F.2d 725, 726 (C.A. 2): "[T]he unexplained coincidence of time with respect to the principal events was really no coincidence at all, but rather part of a deliberate effort by the management to scotch the lawful measures of the employees before they had progressed too far toward fruition."

[28] "The discharge of qualified workers who are also active unionists '. . . is a circumstance of suspicion which may give rise to a justified inference of violative discrimination.' " *Betts Baking Co. v. N.L.R.B.*, 380 F.2d 199, 204 (C.A. 10).

[29] ". . . every equivocal act that was done may be properly viewed in the light of respondent's animus toward the effort to organize its men." *N.L.R.B. v. Houston and North Texas Motor Freight Lines, Inc.*, 193 F.2d 394, 398 (C.A. 5), cert. denied 343 U.S. 934.

[30] "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character." *Interstate Circuit, Incorporated v. U.S.*, 306 U.S. 208, 226. See also *Threads-Incorporated*, 124 NLRB 968, 971.

[31] ". . . the 'real motive' of the employer in an alleged 8(a)(3) violation is decisive." *N.L.R.B. v. Brown d/b/a Brown Food Store*, 380 U.S. 278, 287. "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* [*Los Angeles-Seattle Motor Express*] *v. N.L.R.B.*, 365 U.S. 667, 675.

[32] In reaching this conclusion the adverse inference which may be drawn from the failure of the General Counsel to call Veneziano as a witness has been considered and weighed.

C. *The Discharges of the Remaining Alleged Discriminatees*

The credible evidence establishes without doubt that the Respondent intended to and did discharge employees because they signed union cards. This message was given by Mrs. Johnston to those employees who were in the lobby on March 11 and it was reiterated by Administrator Robinson to those employees who were at the foot of the hill on March 11 when Robinson said that the employees might as well take their checks because they were all fired. Thus, except for card signers Bernice Bowden, Willie B. Hall, Dorothy Hartefield, Imogene Maharrey, Etha L. Martin, Lutitia Swanson, and Vicki Grammer who were neither in the lobby nor at the bottom of the hill, all of the discriminatees had been notified by word of mouth that they were discharged. That the Respondent intended to discharge all card signers is evident from the fact that when the second-shift employees revealed to Robinson that they were also card signers, he asked them to wait for their second checks and did not disavow Mrs. Johnston's remark that all card signers were fired. Moreover, card signer Tabb who was not scheduled to work until Monday received two checks, his pay in full, on March 11. Indeed, on the following Wednesday when employee Avery was scheduled to work, Mrs. Johnston did not dispel the belief that she was fired but said she would mail her last check to her. That the Respondent did not intend to offer any of the card signers reemployment is further buttressed by the fact that when Posey sought reemployment, Mrs. Johnson told him that he could not return to work until "this mess" was over. It is clear from the record as a whole that the Respondent did not want a single card signer in its employ, but wished them all at the bottom of the hill with the rest of the "idiots." Mrs. Johnson's threat to fire any employee who signed a union card was not an idle threat, but was executed with vigor and dispatch when all card signers were given their final checks. Under these circumstances, it is trenchant that the Respondent intended to and did discharge

all card signers,[33] the true purpose ow which was to discourage membership in a labor organization. Its claim that these employees "abandoned their employment and 'quit without notice' and engaged in a 'called strike' or 'walk out' against the Respondent," or as stated in its answer, "said employees quit without notice and thereby abandoned all lawful interest in the said employment" is wholly without merit. Accordingly, by the discharges of the discriminatees listed in the complaints and the amendment of the complaint,[34] the Respondent violated Section 8(a)(3) of the Act.

Conclusions of Law

1. The Union is a labor organization within the meaning of the Act.

2. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

---

[33] See *Casino Operations, Inc.*, 169 NLRB 328, 329.

[34] The General Counsel concedes that Effie Henderson and Vicki Grammer, listed in the amendment to the complaint in Case 10-CA-9482, are supervisors within the meaning of the Act for the purposes of this decision. Nevertheless, the General Counsel asserts that the Respondent violated Sec. 8(a)(3) of the Act by their discharges, citing *Krebs and King Toyota, Inc.*, 197 NLRB No. 74. There is no doubt that Mrs. Johnston intended to and did discharge employees because they signed union cards and that the true purpose of the Respondent was to discourage membership in a labor organization. The discharges of card signers Henderson and Grammer were in furtherance of the same purpose and a part of the Respondent's strategy to rid itself of the Union. Their discharges had a tendency to cause employees to forsake or avoid membership in a union for fear that they would be subjected to the same reprisal. As stated in *Miami Coca Cola Bottling Company d/b/a Key West Coca Cola Bottling Company*, 140 NLRB 1359, 1361, discharges such as those of Henderson and Grammer are "an integral part of a pattern of conduct aimed at penalizing employees for their union activities." (Cited with approval in *Krebs and King Toyota, Inc., supra.*) Thus Henderson and Grammer were, as were the other employees, discriminated against in regard to "tenure of employment" to "discourage membership" in a labor organization and thereby the Respondent violated Sec. 8(a)(3) and (1) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By unlawfully discharging Ola Veneziano on February 27, 1972, and Edna Avery, Clara Barnett, Margaret Edna Barnett, Maxine Bell, Mabel Black, Bernice Bowden, Emma Bryant, Willen Dean Carey, Zollie Culverson, Ruby Carpenter, Nannie Mas Collins, Lucile Cummins, Kathleen Gillian, Willie B. Hall, Dorothy Hartefield, Mamie L. Henderson, Dorothy Hicks, Mattie Hill, Winifred Hudson, Richard Jones, Odesa Carlton, Luvenia Kenerly, Mattie Kennedy, Mary Kate Lanier, Dovie Lee, Imogene Maharrey, Etha L. Martin, Elvira Mason, Dorothy Mc Daniel, Magnolia Mitchell, Missa Norris, Nettie Peak, Helen Peeler, Willie Posey, Eleanor Reese Mills, Mary Elizabeth Richey, Lutitia Swanson, Andrew Tabb, Addie L. Ward, Etta Lee Wright, Quenten Oliver Varner, Vicki Grammer, and Effie Henderson on March 11, 1972, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED REMEDY

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

It having been found that the Respondent unlawfully discharged Ola Veneziano, Edna Avery, Clara Barnett, Margaret Edna Barnett, Maxine Bell, Mabel Black, Bernice Bowden, Emma Bryant, Willen Dean Cary, Zollie Culverson, Ruby Carpenter, Nannie Mae Collins, Lucile Cummins, Kathleen Gillian, Willie B. Hall, Dorothy Hartefield, Mamie L. Henderson, Dorothy Hicks, Mattie Hill, Winifred Hudson, Richard Jones, Odesa Carlton, Luvenia Kenerly, Mattie Kennedy, Mary Kate Lanier, Dovie Lee, Imogene Maharrey, Etha L. Martin, Elvira Mason, Dorothy McDaniel, Magnolia Mitchell, Missa Norris, Nettie Peak, Helen Peeler, Willie Posey, Eleanor Reese Mills, Mary Elizabeth Richey, Lutitia Swanson, Andrew Tabb, Addie L. Ward, Etta Lee Wright, Quenten Oliver Varner, Vicki Grammer, and Effie Henderson it is recommended that Respondent remedy such unlawful conduct. It is recommended in accordance with Board policy[35] that the Respondent offer said employees[36] immediate and full reinstatement to their former po-

[35] See *The Rushton Company*, 158 NLRB 1730, 1740.

[36] In respect to Varner, in view of the serious nature of his misconduct the General Counsel does not contend that he is entitled to reinstatement and full backpay. ". . . a striking employee's misconduct may justify an employer's refusal to reinstate. 29 U.S.C. Sec. 160(c). The question in each case is whether, under the circumstances, the alleged misconduct of the striker is sufficient to justify the refusal to reinstate." *W. J. Ruscoe Company v. N.L.R.B.*, 406 F.2d 725, 727 (C.A. 6). Varner's conduct plainly was of such a character as to justify the Employer's refusal to reinstate him. However, the General Counsel claims that under the circumstances Varner is nevertheless, entitled to backpay from March 11, the date of his discharge, until the day of the Loma Robertson incident. In the case of a discriminatory discharge in violation of Sec. 8(a)(3) of the Act, the remedial purpose is both to restore the "situation, as nearly as possible, to that which would have obtained but for the illegal discrimination," (*Phelps Dodge Corporation v. N.L.R.B.*, 313 U.S. 177, 194) and to deter the employer from a repetition of like misconduct. Since the public interest is at stake, the employer ought not to be allowed, as a matter of course, to profit from his own wrongful misconduct and be wholly exonerated from the Act's intentions because the employee likewise was at fault. Indeed, the Board will balance the severity of the employer's unfair labor practice which provoked the industrial disturbance against whatever employee misconduct may have occurred in the course of the strike." *N.L.R.B. v. Thayer Company and H. N. Thayer*, 213 F.2d 748, 755 (C.A. 1). Thus, where circumstances permit, the Act's sanctions ought to be accommodated. In that case some backpay accrued during a period prior to the time the employee's misconduct occurred

sitions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings that they may have suffered as a result of the discrimination against them by payment to them of a sum of money equal to the amount they would have earned from the date of their discriminatory discharges to the date of an offer of reinstatement, less net earnings during such period to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and including interest at the rate of 6 percent per annum in the manner set forth in *Isis Plumbing & Heating Co.*, 130 NLRB 716.[37]

---

and during a period in which the employer normally would have been obligated for backpay which was ordered not only as a restoration of the *status quo ante* but also as a deterrent against the Employer's repetition of like misconduct. Thus under the circumstances of this case there seems to be no sound reason to wholly set off the remedial demands of the Act and void its deterrent effect because of the subsequent misconduct of an employee which has no relevance to the Employer's misconduct unless one were to reason that the employee's misconduct would not have occurred had the Employer not unlawfully discharged him. Acocrdingly, as requested by the General Counsel backpay for Varner is awarded from March 11 until the day of the Loma Robertson incident.

In respect to the conduct of the other discriminatees, it was not of such a serious or flagrant nature as to justify the withholding of the normal remedy of reinstatement and full backpay. *Hartman Luggage Company*, 183 NLRB No. 128; *Stewart Hog Ring Company, Inc.*, 131 NLRB 310, 313.

[37] "Reinstatement is the conventional correction for discriminatory discharge." *N.L.R.B. v. International Van Lines*, 405 U.S. 953; but here, since the Respondent ceased doing business on September 22 when Vari-Care took over the Respondent's operations, the "conventional correction" may not be accommodated because the Respondent may no longer be an employer of employees. Thus, the discriminatees, at this stage of the proceedings, are left without the likelihood of an offer of reinstatement from the Respondent. Their predicament in this respect has been caused by the Respondent's misconduct and through no fault of their own. They have lost wages and will continue to lose wages until such time as they find substantially equivalent employment. The Respondent has not only caused the loss of the discriminatees' jobs but the loss of the wages which they would

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10 (c) of the Act, it is hereby recommended that the following Order be issued.[38]

ORDER

The Respondent, Fairview Nursing Home, its officers, agents, successors, and assigns and its owner, Esther J. Johnston, her agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging concerted activities of its employees or membership in the Public Employees Organizing Committee or any other labor organization by unlawfully discriminatorily discharging any of its employees, or by unlawfully discriminating

---

have earned had they been working for the Respondent until September 22 and the additional loss of the wages which they would have earned after September 22 until such time as they would have found substantially equivalent employment. Effectuation of the policies of the Act demands that the discriminatees be "as nearly as possible" countervailed, for the appropriate remedy requires "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corporation v. N.L.R.B.*, 313 U.S. 177, 194. Since the "as nearly as possible" remedy in the instant case can not be attained unless it provides for full restoration of backpay, including the backpay which may accrue after September 22, it is recommended that the backpay to be paid by the Respondent be awarded to each discriminatee, commencing on March 11 and continuing thereafter until such time as the discriminatee is gainfully employed in a substantially equivalent position to that in which he or she was employed by the Respondent. In this regard it is significant that by reason of the Respondent's misconduct, the discriminatees' chance of employment with Vari-Care, Inc., was frustrated.

[38] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

in any manner in respect to their hire and tenure of employment or any term or condition of employment in violation of Section 8(a)(3) of the Act.

(b) Unlawfully interrogating its employees regarding their union activities.

(c) Unlawfully spying on its employees' union activities or creating an impression of surveillance of its employees' union activities.

(d) Unlawfully threatening employees that they will be discharged if they sign union authorization cards.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization to form labor organizations, to join Public Employees Organizing Committee or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities, subject to the union-security requirements of Section 8(a)(3) of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Ola Veneziano, Edna Avery, Clara Barnett, Margaret Edna Barnett, Maxine Bell, Mabel Black, Bernice Bowden, Emma Bryant, Willen Dean Cary, Zollie Culverson, Ruby Carpenter, Nannie Mae Collins, Lucile Cummins, Kathleen Gillian, Willie B. Hall, Dorothy Hartefield, Mamie L. Henderson, Dorothy Hicks, Mattie Hill, Winifred Hudson, Richard Jones, Odesa Carlton, Luvenia Kenerly, Mattie Kennedy, Mary Kate Lanier, Dovie Lee, Imogene Maharrey, Etha L. Martin, Elvira Mason, Dorothy McDaniel, Magnolia Mitchell, Missa Norris, Nettie Peak, Helen Peeler, Willie Posey, Eleanor Reese Mills, Mary Elizabeth Richey, Lutitia Swanson, Andrew Tabb, Addie L. Ward, Etta Lee Wright, Vicki Grammer, and Effie Henderson immediate and full reinstatement to their positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, discharging if necessary any employees hired to replace them and make them (and Quenten Oliver Varner) whole for any loss of pay that they may have suffered by reason of the Respondent's discrimination against them in accordance with the recommendations set forth in the section of this Decision entitled "Recommended Remedy."

(b) Preserve and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its premises at the Fairview Nursing Home, Birmingham, Alabama, copies of the attached notice marked "Appendix."[39] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

---

[39] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

IT IS FURTHER RECOMMENDED that the complaints be dismissed insofar as they allege violations of the Act other than those found in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board, after a trial in which all parties were permitted to introduce evidence, found that we discharged Ola Veneziano, Edna Avery, Clara Barnett, Margaret Edna Barnett, Maxine Bell, Mabel Black, Bernice Bowden, Emma Bryant, Willen Dean Cary, Zollie Culverson, Ruby Carpenter, Nannie Mae Collins, Lucile Cummins, Kathleen Gillian, Willie B. Hall, Dorothy Hartefield, Mamie L. Henderson, Dorothy Hicks, Mattie Hill, Winifred Hudson, Richard Jones, Odesa Carlton, Luvenia Kenerly, Mattie Kennedy, Mary Kate Lanier, Dovie Lee, Imogene Maharrey, Etha L. Martin, Elvira Mason, Dorothy McDaniel, Magnolia Mitchell, Missa Norris, Nettie Peak, Helen Peeler, Willie Posey, Eleanor Reese Mills, Mary Elizabeth Richey, Lutitia Swanson, Andrew Tabb, Addie L. Ward, Etta Lee Wright, Quenten Oliver Varner, Vicki Grammer, and Effie Henderson unlawfully and that by their discharges we discouraged employees from becoming and remaining members of Public Employees Organizing Committee or any other labor organization.

WE WILL offer the above-named employees (except for Quentin Oliver Varner) their former jobs or, if their jobs no longer exist, substantially equivalent positions and will restore their seniority.

WE WILL pay them any backpay they have lost because we discharged them.

WE WILL NOT discharge any employee for the same reasons for which the Board found that we discharged the above-named employees.

WE WILL NOT unlawfully discharge employees for lawfully engaging in union activities or protected concerted activities.

WE WILL NOT unlawfully interrogate any employees with respect to their union activities.

WE WILL NOT unlawfully spy on our employees' union activities or create an impression that we are spying on our employees' union activities.

WE WILL NOT threaten to or discharge employees for signing union authorization cards.

The laws of the United States give all employees these rights:

To organize themselves

To form, join, or help unions

To bargain as a group through representatives they choose

To act together for collective bargaining or other mutual aid or protection

To refuse to do any or all of these things, subject to the union-security requirements of Section 8(a)(3) of the National Labor Relations Act, as amended.

All of our employees are free to remain, or refrain from becoming or remaining, members of a labor organization.

FAIRVIEW NURSING HOME
(Employer)

Dated By
(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 2102 City Federal Building, 2026 Second Avenue North, Birmingham, Alabama 35203, Telephone 205-325-3877.

APPENDIX D

In the Circuit Court for the
Tenth Judicial Circuit of Alabama

Nettle Mae Peak, Plaintiff, v. State Department of Industrial Relations, Defendant.	Case No. 37697 (Cases Nos. 37701-37713)

Appellant's Designation of Record on Appeal

Appellant requests the Clerk to include the following:

1. Complaint

2. Answer

3. Plaintiff's Exhibit No. 1 being a copy of the decision in the case of *NLRB v. Fairview Nursing Home*.

Appellant requests the Court Reporter to transcribe an original and two copies of the following reporter's transcript:

1. Testimony of plaintiffs.

Appellant having designated less than the entire reporter's transcript hereby deignates the following issues on appeal:

1. Does the National Labor Relations Board exercise preemptive jurisdiction of all issues relating to the discharge of employees on account of union activity.

2. Is the decision of the National Labor Relations Board holding that the employees were unlawfully discharged on account of union activity res judicata in this proceeding.

3. Can the Department of Industrial Relations penalize employees who, after their unlawful discharge in violation of the National Labor Relations Act, then strike to protest their discharge.

APPENDIX E

In the Supreme Court of Alabama

Nettie Mae Peak, et al., Petitioners,

v.

State Department of Industrial Relations, Appellee,

and

Fairview Nursing Home, Employer-Intervenor.

This Petition seeks to review the decision of the Court of Civil Appeals dated June 23, 1976. A Petition for Rehearing was overruled on July 14, 1976. Copies of said decisions are attached hereto.

The Petition is grounded on Rule 39 (c) (1). The decision of the Court of Civil Appeals initially and incorrectly construes a controlling provision of the Federal Constitution. The lower court has failed to follow the Supremacy Clause of the Constitution of the United States by approving the denial of unemployment compensation benefits to employees discharged in violation of federal law.

COOPER, MITCH & CRAWFORD
By GEORGE C. LONGSHORE
409 North 21st Street
Birmingham, Alabama 35203
Attorneys for Petitioners
